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In the Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS LYNCH, INDIVIDUALLY AND AS MAYOR OF THE CITY OF PAWTUCKET, RICHARD A. MUMFORD, INDIVIDUALLY AND AS FINANCE DIRECTOR FOR THE CITY OF PAWTUCKET, AND GUY DUFAULT, INDIVIDUALLY AND AS DIRECTOR OF PARKS AND RECREATION OF THE CITY OF PAWTUCKET, AND THE CITY OF PAWTUCKET,

PETITIONERS,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG GREZIER AND AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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I. IT IS NOT THE GOAL OF THE ESTABLISHMENT CLAUSE TO DIVORCE GOVERNMENT FROM RELIGION.

Respondents' brief, in its Summary of Argument, asserts that the municipal sponsorship in this case "...is flatly contrary to the goal of the Establishment Clause, which is to divorce religion from government." (Resp. Br., p. 20) That proposition is the foundation for the decisions below and for

the entire position of Respondents in this case. The only justification for the removal of the nativity theme from public celebrations of Christmas would be a constitutional requirement that all contact between government and religion must be eliminated. It is respectfully submitted that under the decisions of this Court, the divorcement of religion from government is not, and never was, the goal of the Establishment Clause. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *McGowan* v. *Maryland*, 366 U.S. 420 (1960); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). Contact between government and religion has long been recognized by this Court as inevitable, permissible, and, to the extent that government is entitled to advance our national culture and tradition, desirable. In order to "divorce" itself from religion, government would be required to seek out and expunge from its activities those practices which "... are deeply imbedded in the history and tradition of this country." *Marsh* v. *Chambers*, __ U.S. __, 103 S.Ct. 3330, 3333 (1983). Such an effort is precisely what is required by the decisions below and by the position of Respondents herein. It is an effort which this Court has often repudiated as an Establishment Clause mandate.

Flowing from the proposition that the First Amendment requires government to eliminate all religious contact from its activities is the contention underlying the position of Respondents and the amici who support them that government is required to "take Christ out of Christmas."[1] It is

[1] Respondents urge acceptance of the conclusion of the District Court that it is constitutionally infirm for government to endorse the view of its citizens that "...It is a 'good thing' to have a creche in a Christmas display ...because it is a good thing to 'keep Christ in Christmas.'" (Resp. Br., p. 55) Such a conclusion, of course, assumes that the nativity theme is in fact a part of the Christmas tradition. It also assumes that the Christmas celebration is dominantly secular since it recognizes that the observance can go forward without its religious components. The essence of Respondents' position is that public observances of the holiday must "take Christ out of Christmas."

respectfully submitted that the principle of neutrality embodied in the Establishment Clause would neither authorize government to "put Christ into" Christmas nor to "take Christ out of" Christmas. The religious elements in American culture and tradition derive from the practice and beliefs of the American people, and their passive recognition by government is a simple acknowledgement of that fact. Government did not put religion into the Christmas tradition, and the Establishment Clause was not intended to require government to remove religion from its observance of that tradition. Governmental advancement of religious activity has never been part of the national tradition and is clearly prohibited by the Establishment Clause. But governmental recognition of the religious beliefs of the people and of the religious heritage of our institutions has been part of the fabric of our national life since the adoption of the First Amendment.

In *Marsh* v. *Chambers*, *supra*, this Court sustained the constitutionality of legislative prayer and the practice of paid legislative chaplaincies. Referring to the historical practice of legislative prayer, this Court held that the founding Fathers "...did not consider opening prayers as a proselytizing activity..." but rather as an activity which "harmonize(d) with the tenets of some or all religions." *Marsh* v. *Chambers*, 103 S.Ct. at 3335 (citing *McGowan* v. *Maryland*, 366 U.S. 420). Rejecting the proposition that legislative prayer was a public promotion of religious beliefs, this Court stated, at 103 S.Ct. 3336:

> "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country."

In *Marsh*, this Court reaffirmed the long-standing principle that the mere recognition of religion by government is not a

promotion of its content. What the Founding Fathers sought to prohibit in the First Amendment was "proselytizing activity."

Because Respondents' position is premised on the divorcement of government from religion, they argue that any governmental display of "undeniably sectarian" material is a violation of the Establishment Clause. (Resp. Br., pp. 13, 21-27). They reject the proposition that the use of such "undeniably sectarian" material may be nothing more than the acknowledgement of religious tradition.[2] Acceptance of this position would mean that a finding of explicitly religious content in government activity compels a conclusion of unconstitutionality. It is submitted that this argument is in sharp conflict with the decisions of this Court. It is not the explicitly religious nature of the material but rather the manner in which it is presented which determines whether government is promoting its religious content or merely recognizing religious traditions.

To support the general proposition that government is prohibited from including explicitly religious content in its sponsored activities, Respondents place heavy reliance on the decision of this Court in *Stone* v. *Graham*, 449 U.S. 39 (1980).[3] It is

[2] "Expending public funds to erect and maintain an avowedly sectarian symbol is far more than acknowledgement; it is support and enforcement." (Resp. Br., p. 27) But if, as Respondents argue (Resp. Br., p. 33), government may celebrate only the secular components of Christmas, then it would be prohibited from acknowledging the religious tradition at all. The substance of Respondents' argument is that any religious content in government activity is a promotion of religion. It is hardly less than "avowedly sectarian" for government to expend public funds for the salary of a chaplain whose duties include public prayer recitation. *Marsh* v. *Chambers*, *supra*. And the "avowedly sectarian" character of the Bible and of the Ten Commandments does not prohibit their use by public schools as part of secular instruction. *Abington School District* v. *Schempp*, *supra*; *Stone* v. *Graham*, *supra*.

[3] Respondents also rely on *Larkin* v. *Grendel's Den, Inc.*, __ U.S. __, 103 S.Ct. 505 (1983) (Resp. Br., pp. 22, 23) in which this Court invalidated a statute giving churches the right to veto governmental issuance of liquor licenses. In that case, churches were exercising governmental power delegated to them by the state, and this Court held that: "The Framers did not set up a system of government in which important discretionary govern-

submitted that such reliance not only overstates the decision in *Stone* v. *Graham*, *supra*, but also ignores the effect of *Marsh* v. *Chambers*, *supra*.[4] In *Stone*, this Court invalidated a state statute mandating the isolated display of the Ten Commandments in public school classrooms. In so doing, this Court stated that even in a public school context the Ten Commandments could be employed as part of secular instruction. Moreover, this Court has repeatedly distinguished religious content in public elementary and secondary school instruction from religious content in other forms of governmental activity. *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976). Although prayers in public schools constitute religious activity, *Engel* v. *Vitale*, 370 U.S. 421 (1962), prayers in legislatures do not. *Marsh* v. *Chambers*, *supra*.[5] Clearly, the

mental powers would be delegated to or shared with religious institutions." __ U.S. __, 103 S.Ct. 512. The constitutionality of the exercise of governmental power by churches has nothing to do with the constitutionality of recognizing religious tradition in public holiday celebrations.

[4] Respondents interpret *Stone* v. *Graham*, *supra*, as prohibiting governmental use of religious symbolism. But *Marsh* v. *Chambers* upheld certain public uses of prayer. A prayer expresses what a religious symbol may imply. If prayers can, under some circumstances, be used in public activities, it is incongruous to suggest that government may never use a religious symbol in a holiday observance.

[5] Notwithstanding this Court's decision in *Marsh* v. *Chambers*, *supra*, Respondents argue that "... government's use of sectarian religious symbolism in schools as opposed to parks is of no legal significance." (Resp. Br., p. 63, n. 19) They base this argument in part on the fact that the City's Christmas celebration includes those traditional holiday components which appeal to children. But the obvious thrust of the celebration is the observance of the entire festival of Christmas, and this would be apparent even in the school setting. *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. den.* 449 U.S. 987 (1980). Furthermore, the display which includes the creche is situated in the commercial shopping area of the City likely to attract only those children who are accompanied by adults, or at least have the permission of adults to attend. Attendance in a public school classroom is mandatory, and the atmosphere is instructional; these factors have been critical to this Court's special treatment of religion in the educational environment. Anyone who visits the Hodgson Park display in this case is obviously there to celebrate Christmas—not to receive instruction under coercion of law.

religious content of prayer in legislatures is no different from the content of prayer in schools. Nor is the religious content of the Ten Commandments or of the Bible any different whether they are used for instruction or for religious exercises.[6] Emphasis upon the religiosity of the challenged element in government action fails to meet the Establishment Clause criteria developed by this Court. The constitutional issue is whether the government action is promoting religious beliefs or merely acknowledging religious tradition, and that issue must be resolved by an examination of the context within which the religious component is found.

II. The Passive Use Of Religious Symbolism In A Secular Public Holiday Celebration Is A Permissible Acknowledgment of Religion.

In this case, the most important part of the context of the City's sponsorship is the Christmas holiday itself. Although Respondents argue that "... Pawtucket has chosen to enlist the power of the state to celebrate... religious dogma" (Resp. Br., p. 20), on the record in this case a failure to conclude that the City is celebrating the national folk festival of Christmas is, to use Respondents' language (Resp. Br., p. 26), "to blink at reality." The inclusion of religiosity in public holiday celebrations is as "... deeply imbedded in the history and tradition of this country..." (*Marsh* v. *Chambers*, 103 S.Ct. at 3333) as is the practice of legislative prayer. Presidential Thanksgiving proclamations were, from the beginning, avowedly religious in content—far more so than the inclusion of a creche in a

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[6] Just as the Ten Commandments can legitimately be employed in secular school instruction, they can also be used as a traditional symbol of law. *Anderson* v. *Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973); see also Amicus Brief of the United States herein, p. 14.

secular Christmas display.[7] Clearly, the Founding Fathers did not intend that such explicit religiosity was a violation of the Establishment Clause; they viewed it instead as "...a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh* v. *Chambers*, 103 S.Ct. 3336. And, unlike the contemporary American Christmas, the thanksgiving holiday established by the Founding Fathers was exclusively religious.[8] If, as Respondents argue, government could, under the Establishment Clause, celebrate only the secular components of Christmas, then the thanksgiving holidays created by the founding Fathers could not have been celebrated at all. Those holidays were observed because the Framers of the Constitution regarded them—with their explicit religious content—as a permissible acknowledgment of religion.

The nativity theme in the national observance of Christmas is an integral part of the holiday which coincides with religious beliefs in much the same way that Sunday closing laws coincide with religious practice. *McGowan* v. *Maryland*, *supra;* see *Marsh* v. *Chambers*, *supra*. Respondents contend that *McGowan* v. *Maryland* "...has little relevance here..." (Resp. Br., p. 34) And one of their amici argue that this case and *McGowan* "could not be more different."[9] But *McGowan*

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[7] President Washington's proclamation of October 3, 1789, began by stating that, "...It is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor..." The proclamation went on to record, "...both Houses of Congress have, by their joint committee, requested me 'to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.' " Messages and Papers of the Presidents, Bureau of National Literature, Inc., 1897, Vol. I, p. 56.

[8] *Id.*

[9] Brief Amicus of Anti-Defamation League and American Jewish Congress, p. 12. That brief attempts first to distinguish *McGowan* on the ground that Sunday closing laws regulate a secular activity. But the celebration of Christmas is also a secular activity. See Brief of Petitioners herein, pp. 16-21. Secondly, that brief asserts that Sunday closing laws provide "...only an in-

v. *Maryland* stands for the principle that government action may benefit religion if that action has a dominantly secular design and impact. It also stands for the principle that religious elements which remain in contemporary secular tradition with religious origins do not prevent government from observing that tradition. If, as Respondents concede, government is entitled to celebrate Christmas, it is because the holiday is secular; the observance of its religious component is an indirect and incidental acknowledgment of religion.

Respondents disavow a constitutional attack on public celebrations of the Christmas holiday (Resp. Br., pp. 32-33) simply by asserting that they do not challenge either the legalization of the holiday or observance of its secular components. Their argument seems to be that government may celebrate Christmas as long as it pretends that the nativity theme is not part of the holiday tradition. But the fact is that the nativity theme is the origin of the holiday tradition. As the dissenting opinion below points out (Cert. Pet. A-197), it is not consistent to permit celebration of a holiday whose religious roots are imbedded in its tradition while at the same time prohibiting acknowledgment of these roots. A nativity scene in December is no more explicitly religious than are the words "Christ" and "Mass" in the word "Christmas."

Respondents' brief quotes, and urges on this Court, the conclusion of the District Court that, "...Pawtucket's use of a patently religious symbol raises an inference that the City approved and intended to promote the theological message that the symbol conveys." (Resp. Br., p. 53, citing 525 F.Supp. 1172) Such a conclusion is clearly at odds with the decision of this Court in *Marsh* v. *Chambers*, *supra*, which held that the

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direct benefit to religion because the statutory day of rest coincides with the religious day of rest." But Sunday is the day on which millions of Americans practice their religious beliefs. It is also the day on which many Christian churches depend for their financial support. To suggest that a Christmas symbol benefits religion as much as or more than Sunday closing laws is unrealistic.

Founding Fathers viewed "patently religious" prayer as a permissible acknowledgment of religion.[10] It is a conclusion which would have compelled the invalidation of the "patently religious" 1789 Thanksgiving proclamation of President Washington.[11] Also, the conclusion of the District Court ignores the fact that "...the nativity scene has 'acquired a significance which is no longer confined to the religious sphere of life.' " *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 508 F.Supp. 823 (1981) citing *Florey* v. *Sioux Falls School District*, *supra*; see also *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970); *A.C.L.U.* v. *Harris County*, S.D. Tex., C.A. No. H-82-3875, Memorandum and Order, August 4, 1983. The nativity theme is an accepted and traditional part of the American Christmas, and to recognize Christmas but prohibit the recognition of one of its components "...would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." *McGowan* v. *Maryland*, 333 U.S. 445.

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[10] Respondents argue that religion may be employed in government activity only if its use is, in Respondents' word, "rote." (Resp. Br., p. 55, n. 18) This would mean that government may acknowledge religion only if it is not taken seriously. The Founding Fathers evidenced no such intent, and their public conduct was totally inconsistent with such a view toward religion. The public prayers of Samuel Adams and George Washington were anything but "rote." The disdain for religious sincerity implicit in Respondents' argument is hardly in keeping with the creation of Thanksgiving as a national day of Prayer.

[11] See footnote 7.

Conclusion

For the reasons stated and upon the authorities cited, the judgment of the Court of Appeals should be reversed, and the case should be remanded for entry of judgment in favor of the Petitioners.

Respectfully submitted,

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